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May 12, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, MM Docket No. 92-264

Dear Ms. Searcy:

Enclosed are an original and nine copies of the Reply Comments of Liberty Media Corporation in this proceeding. We would appreciate your assistance in distributing a personal copy of Liberty's Reply Comments to

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

REPLY COMMENTS
OF LIBERTY MEDIA CORPORATION

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May 12, 1993

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SUMMARY

Advocates of overly restrictive channel occupancy and horizontal concentration limits would sacrifice substan-

minority ownership interests are insufficient to motivate discrimination in carriage decisions, where a cable operator's primary incentive is to carry programming which will increase subscribership. Likewise, in claiming that strict channel occupancy limits are needed to protect unaffiliated programmers, they offer nothing to refute three previous empirical studies which conclude that cable operators do not discriminate in favor of affiliated programmers and have no incentive to do so. The annexed analysis of programming carriage by cable systems in which Liberty Media holds an ownership interest further supports that conclusion.

Thus, the record clearly indicates that restrictive channel occupancy limits are likely to deter investment in programming services, and may deprive subscribers of programming they desire, without affording any demonstrable benefit whatsoever to programmers or subscribers. In any event, regional programming services and services for which there is substantial demonstrated demand by consumers should be exempt from the channel occupancy limits ultimately adopted by the Commission.

Alternative distributors and other commenters also seek to impose a variety of national and regional subscriber limits, many directly contrary to the express intent of Congress. The record demonstrates that any such limits should apply nationally and should not be lower than 30 to 40 percent of homes passed. Such a national limit would neither require divestiture by existing multiple system owners nor create entry barriers for new programmers.

Regional subscriber limits clearly are unwarranted. Cable consolidation at the regional level has benefitted subscribers by creating operating efficiencies which reduce costs and by facilitating the development of regional programming services. The only commenter advocating regional subscriber limits has a vested financial interest in precluding the development of local and regional programming services which may compete with local broadcast stations for advertising revenues. Such economic protectionism cannot justify the imposition of regional subscriber limits which will adversely affect subscribers.

Finally, the record provides no support for any additional limits on cable operator involvement in the creation or production of video programming. Allegations of cable's "dominance" of the programming market are contrary to the facts, and the Commission's program access rules directly address issues relating to the availability of programming to alternative distribution media. It would arbitrary and capricious for the Commission to impose additional structural restrictions on cable involvement in programming without first evaluating the marketplace effects of the other provisions of the 1992 Cable Act and the Commission's implementing regulations.

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REPLY COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") submits these reply comments in response to selected comments in this proceeding.[1] The record confirms that overly restrictive channel occupancy and horizontal concentration limits will sacrifice efficiencies and deter investment in new programming services with no corresponding benefit to programmers or viewers.

Preliminary Statement

Rarely is the Commission confronted with such clear evidence of the appropriate course of action in a rulemaking proceeding. Programmers, the primary intended beneficiaries

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[1] Pursuant to the Commission's Order, DA 93-233 (rel. Feb. 26, 1993), these reply comments are confined to the vertical integration and horizontal concentration issues under Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Liberty Media [illegible]

of Section 11, have provided numerous examples of investments by cable operators -- often when no other investor was willing to take the same risk -- essential to the creation, continuation or improvement of particular programming services. Cable operators have identified substantial operating and administrative efficiencies arising from cable consolidation, particularly at the regional level, which have yielded significant benefits to consumers. In contrast, not one independent programmer has claimed a denial of carriage because of "favoritism" on the part of vertically integrated cable operators or any other injury from horizontal consolidation or vertical integration in the cable industry.

Nevertheless, alternative distributors and other commenters seek to impose upon cable operators a wide variety of structural restrictions, many directly contrary to the express intent of Congress. These commenters offer no empirithat such sweeping regulatory proposals "would not inhibit the development of new programming." See Comments of Liberty Cable Company, Inc. ("Liberty Cable") at 7.

The Commission's choice is clear. Based on the undeniable evidence of substantial benefits resulting from cable consolidation and investment in programming, it should reject the unsupported "assurances" of proponents of broad structural restrictions and heed the uniform warnings of programmers that such regulations will seriously impair the development of new and better programming and adversely affect viewers.

I. Vertical Integration And Horizontal Consolidation By Cable Operators Have Resulted In Substantial Benefits To Consumers And Programmers.

The "vertical and horizontal limits required by Section 11" of the 1992 Cable Act purportedly address Congressional concerns that horizontal consolidation and vertical integration in the cable industry might create "barriers to entry for new programmers," reduce "the number of media voices available to consumers," and/or motivate cable operators "to favor their affiliated programmers over other programming services." Notice of Proposed Rulemaking and Notice of Inquiry, MM Docket No. 92-264, FCC 92-542 (rel. Dec. 28, 1992) ("Notice"), at ¶5. However, the record in this proceeding demonstrates that cable consolidation and investment in

programming have facilitated the entry of new programming services and substantially expanded the number of media voices available to consumers without injuring independent programmers.

A. Cable Investment Has Expanded The Quantity And Quality Of Programming Available To Consumers.

The channel occupancy limits required under Section 11 of the 1992 Cable Act arise from Congressional concern "that vertical integration limits diversity of cable programming and reduces the number of voices available to the public." Notice at ¶43. However, programmers uniformly report that consolidation and investment by cable operators have facilitated the development and growth of a wide variety of programming services which otherwise would be unavailable to consumers today.

Programmers repeatedly confirm that cable operator investment has been critical to the survival, expansion and improvement of their programming services. See, e.g., Comments of Discovery Communications, Inc. ("Discovery") at 2 ("The Discovery Channel...survived only because cable operators were willing to make an investment in it when no one else would"); Comments of International Family Entertainment, Inc. ("Family") at 2 (without investment by cable operators, "it will not be feasible for networks such as the Family Channel to continue to produce high-quality original programming"); Comments of E! Entertainment Television, Inc. ("E! Entertainment") at 1 ("E! would not exist today had cable companies not stepped forward with financial support at crucial stages in the network's development"); Comments of Turner Broadcasting System, Inc. ("TBS") at 12 (cable investors took "a major risk, one that others would not undertake at comparable terms," in providing long-term equity to TBS); Comments of Affiliated Regional Communications, Ltd. ("ARC") at 6 ("investment by cable operators and revenue generated through carriage on cable systems have been particularly critical to the success of regional sports programming services").

Cable investment in these and other programming services clearly has resulted in a greater diversity of choices for consumers, including a wide variety of niche and special interest programming services never before available to television viewers. See, e.g., E! Entertainment Comments at 3-4 ("without the continued support of MSO investors... unique and innovative services such as Court TV [coverage of court proceedings], the Discovery Channel [science and education], Mind Extension University [education], Black Entertainment Television [minority programming], Comedy Central [comedy], Bravo [arts], American Movie Classics [classic films], Nickelodeon [children's programming], CNN [24 hour news] and The Learning Channel [education] would not be among cable subscribers' viewing options today"). Although some of these services now are among the most popular non-broadcast programming services, cable operators made their investments when the services were unproven and other investors were unwilling to take similar risks. <u>See</u>, <u>e.g.</u>, Discovery Comments at 2, 13-14 (Discovery Channel "now reaches about 59 million subscribers," but "survived only because...cable companies agreed to invest" after no one else would, despite "more than 400 [investment] presentations" by Discovery's founder); TBS Comments in MM Docket No. 92-265 at 7 and attachments (newspaper articles reporting "extreme skepticism" about the launch of TNT).

Cable's contribution to the success of these and other programming services extends far beyond mere financial investment. As the Commission has recognized, cable operators

B. Horizontal Consolidation Promotes New Program Development And Creates Efficiencies Which Benefit Consumers.

Congress also was concerned that "increased concentration in the cable industry had the potential to create barriers to entry for new programmers and to reduce the number of media voices available to consumers." Notice at ¶32. However, the record includes substantial evidence that programmers and consumers have benefitted from horizontal consolidation in the cable industry, particularly at the regional level. Aside from reducing "programmers' transaction costs" (Notice at ¶34), such consolidation has enabled cable operators to achieve efficiencies which reduce costs to consumers and has facilitated the development of regional programming services, particularly news, public affairs and sports services.

1. Administrative And Operating Efficiencies.

The Commission has recognized that cable consolidation has produced "significant efficiencies in administration" (Notice at ¶34), a fact confirmed by several cable commenters in this proceeding. For example, "regional consolidation has permitted Cablevision to establish a centralized operations center to handle customer service, installation, and access programming production," thereby reducing operating costs and promoting more efficient customer service. Comments of Cablevision Systems Corporation ("Cablevision") at 7; see also

Comments of Continental Cablevision ("Continental") at 7-12 (regional consolidation enabled Continental to "support the creation of a large centralized data processing center" to reduce the cost of customer service and billing functions and to establish a regional training center for employees). Such consolidation also facilitates the sale of local advertising on national and regional cable networks. See Id. at 15-16; Discovery Comments at 5-6.

Commenters also confirm that consolidation often provides "the base necessary to justify the expense of deploying fiber optics" and other advanced technologies such as digital compression, which will increase system capacity and further promote the diversity of viewing choices available to consumers. Cablevision Comments at 7-9; see also Comments of Tele-Communications, Inc. ("TCI") at 6-9; Continental Comments at 5-7. Thus, efficiencies achieved through consolidation will be particularly critical to cable's role in creating "the broadband infrastructure that will serve this country's telecommunications needs in the 21st Century." TCI Comments at 8. Likewise, the ability of cable companies "to consolidate regionally is critical to their ability to compete" with regionalized telephone companies as the latter begin to provide video dialtone service. Cablevision Comments at 8-9.

2. New Program Development.

The record also conclusively demonstrates that regional consolidation has added to the diversity of viewing choices available to consumers by facilitating the development of regional cable news, public affairs, sports programming and other niche services. For example, viewers in Long Island, New York had gone "without locally-oriented television since the beginning of broadcast television" until Cablevision started News 12, "an award-winning news and public affairs channel that...has offered coverage of events ranging from local town meetings to the Avianca plane crash." Cablevision Comments at 5. According to Cablevision, "News 12 would not have been possible without access to all of Long Island" because a cable operator "with only a fractional share of the Long Island subscriber base would not have had the incentive or the resources to begin and maintain" such a programming service. Id.[2]

Other cable operators have launched similar regional programming services responsive to the particular needs of viewers in their service areas. See Continental Comments at

Comments of Time Warner Entertainment Company, L.P. ("Time Warner") at 45 (Time Warner systems "in the New York City area recently launched New York 1, a 24-hour, all news service devoted to covering local events"). Cable operators also have promoted the development of regional services which provide foreign language and other programming responsive to the particular needs of various ethnic communities within their service areas. See Liberty Media Comments at 26 (Jade Plus programming service developed for large Cantonese population in San Francisco; Cambodian, Vietnamese and Filipino programming service in Long Beach, California).

In addition, cable operators have invested in regional sports programming services which provide coverage of local sports events, including high school sports and special events not normally covered by broadcasters. See ARC Comments at 4-5; see also Comments of Texas Special Olympics and University Interscholastic League in PP Docket No. 93-21 (regional cable sports network provides coverage of special olympics and high school athletic events not covered by broadcasters). The Commission specifically has recognized that the development of regional sports programming services has contributed substantially to the overall increase in the diversity of programming services available to consumers. See, e.g., Competition, Rate Deregulation And The Commission's Policies Relating To The Provision Of Cable Television Service, 5 FCC Rcd. 4962, 4966 n.8 (1990) ("Report to Congress") (regional sports services are "a primary growth area" in cable programmers; and (c) cable affiliation is not a prerequisite for the success of a new programming service.

The fact that no programmer claimed that it had been the victim of favoritism in any carriage decision by a vertically integrated cable operator did not stop certain broadcast and alternative distribution commenters from alleging a broad and ongoing pattern of discriminatory and anticompetitive practices by cable operators against independent programmers. See, e.g., Comments of the Association of Independent Television Stations, Inc. ("INTV") at 10 (vertical integration by cable operators "has become a mechanism for extracting equity interests from otherwise independent programmers and limiting the development of independent services"); Comments of Community Broadcasters Association ("CBA") at 2 ("cable operators who...claim not to be able to find a place on their systems for LPTV stations, more often than not have little difficulty when a new service comes along in which they have an interest"); Comments of the National Private Cable Association, Maxtel Associates Limited Partnership, MSE Cable Systems and Pacific Cablevision ("NPCA") at 16 ("[v]ertical integration...threatens independent programmers seeking carriage of their programming").

To the extent that these parties complain about cable carriage of broadcast signals, the Commission already has addressed such concerns with its must-carry rules implementing Sections 4 and 5 of the 1992 Cable Act. To the extent that they purport to complain on behalf of unaffiliated programmers, aside from the fact that they lack standing, these parties simply ignore the facts in claiming "discrimination" by cable operators in their carriage decisions.

For example, INTV's unsupported claim that vertical integration by cable operators is a "mechanism for...limiting the development of independent services" and NPCA's sweeping allegation that vertical integration "threatens independent programmers" are contradicted by comments of programmers and others. Three prior empirical studies of cable operator carriage decisions have concluded that cable operators do not discriminate in favor of affiliated programmers in making carriage decisions. See R.W. Crandall, "Vertical Integration And q Ratios In The Cable Industry" (March 1990) (submitted in MM Docket No. 89-600 on April 2, 1990 with the Reply Comments Of Tele-Communications, Inc. In Response To Notice Of Inquiry); B. Klein, "The Competitive Consequences Of Vertical Integration In the Cable Industry" (June 1989); National Telecommunications and Information Administration, "Video Program Distribution And Cable Television: Current Policy Issues And Recommendations" (June 1988).

Because the Commission again has raised the issue of potential discrimination by cable operators in their carriage decisions, Liberty Media also commissioned an analysis by Dr. Crandall of carriage by cable operators in which it has an ownership interest. Dr. Crandall presents his conclusions based upon a survey of nearly 100 cable system headends serving over 1.5 million subscribers in "Vertical Integration And Cable Operator Carriage Decisions" ("Crandall Analysis"), which is annexed as Exhibit A. More specifically, Dr. Crandall compares the carriage of basic cable programming services in which Liberty Media has an ownership interest by cable systems in which it has an ownership interest with the carriage of those programming services by all cable systems. Likewise, he compares the carriage of the fifteen most popular basic cable programming services in which Liberty Media does not have an ownership interest. Consistent with the prior empirical analyses noted above, Dr. Crandall's analysis supports the conclusion that "cable systems in which Liberty Media has an ownership interest are not discriminating in favor of programming services in which it has an ownership interest or against programming services in which it does not." Crandall Analysis at 9. These observed results also are consistent with the obvious disincentives to discriminatory carriage decisions:

> Thus, even if cable operators had the ability and incentive to discriminate in their carriage decisions against unaffiliated programming services, the empirical evidence suggests that such incentive is limited and outweighed by the need to meet viewer demand by offering the best programming available. Where, as appears to be typically the case, a cable operator has only a minority interest in a programming service, its incentive is even smaller and the countervailing forces larger.

Id. at 10.

In addition, comments from programmers in this proceeding confirm that cable operators do not give preferential treatment to affiliated programmers. For example, Discovery plainly states that "[n]either The Discovery Channel nor The Learning Channel has obtained preferential treatment from Discovery's cable operator owners" with respect to carriage decisions or channel position. Discovery Comments at 14-15. Specifically, The Learning Channel "reaches less than 25% of the subscriber base of two of its MSO owners, and just over one-half of the subscriber base of its third MSO owner." Id.

Moreover, independent programmers provide some of the most widely-distributed programming services available on cable. For example, ESPN and USA Network, two programmers which are not "vertically integrated under the terms of Section 613," rank first and third in terms of total subscriber reach. See TBS Comments at 7; CableVision, Feb. 8, 1993, at 42. Moreover, at least a dozen independent programming services reach more subscribers than Courtroom Television Network ("Court TV"), despite that fact that Liberty Media, Time Warner and Cablevision own equity interests in the latter.[3]

[3] According to CableVision, Feb. 8, 1993, at 42, the following services have greater subscriber reach than Court TV: VISN/ACTS Satellite Network; America's Disability Channel; CNBC; Country Music Television; ESPN; EWTN; The Nashville Network; Nostalgia Television; The Sci-Fi Channel; Silent Network; Trinity Broadcasting Network; and USA Network. None of these services appears to be affiliated with a cable operator

Likewise, despite INTV's speculation to the contrary, no programmer reports that a cable operator had "extract[ed] equity interests" from it.[4] Rather, programmers uniformly confirm that they had solicited and welcomed equity investment by cable operators, usually after being repeatedly rejected by other potential investors. Discovery Comments at 13-14; E! Entertainment Comments at 4-5. Moreover, investments by cable operators in programming services often are structured specifically to allow non-cable interests to retain control. See, e.g., TBS Comments at 12 ("TBS selected this cable investor group because the group was prepared to provide long-term equity while preserving the company's independence" enabling Ted Turner to retain "28.2% of equity and 53.6% of voting control").

Finally, cable affiliation clearly is not a prerequisite for the successful launch of a new service, as demonstrated by USA Network's recent launch of the Science Fiction Network, "which has had success comparable to TBS's newest venture, The Cartoon Network." TBS Comments at 7.

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[4] Even if such complaints had existed, the Commission is addressing this potential concern directly through behavioral regulations implementing Section 12 of the 1992 Cable Act. See Notice of Proposed Rulemaking, MM Docket No. 92-265, FCC 92-543 (rel. Dec. 24, 1992), at ¶¶54-58.

II. The Record Does Not Support Imposition Of Restrictive Channel Occupancy Limits.

Section 11 of the 1992 Cable Act requires the Commission to "prescribe reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." See Notice at ¶41 (emphasis added). However, the low attribution levels and restrictive channel occupancy limits advocated by alternative distribution media and other commenters cannot conceivably be justified on the record in this proceeding.

A. The Demonstrated Benefits Of Cable Investment In Programming Services Warrant A Higher Attribution Standard For Channel Occupancy Limits.

The 1992 Cable Act does not specify the attribution standards to be used for the channel occupancy limits pursuant to Section 11. Although the Commission recently decided to apply a 5 percent attribution standard for purposes of the program access provisions of Section 19, it specifically questions whether "higher attribution thresholds are warranted" under Section 11 "in order to provide cable operators with the flexibility to continue investing in new cable programming services." Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265, FCC 93-178 (rel. Apr. 30, 1993) ("Program Access Report"), at ¶11; Notice at ¶46. Nevertheless, alternative distributors and other commenters, concerned only with promoting their own financial interests, have advocated extremely restrictive attribution levels, apparently unconcerned about the effect of such standards on the development of new and diverse programming.

For example, INTV claims that any "[f]inancial interests in...program sources, however small, create the adverse incentives the FCC is seeking to remedy." INTV Comments at 16. Consequently, INTV advocates an attribution